BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION

CHARLES I. LEWIS	)	
Claimant	)	
VS.	)	
	)	Docket No. 193,744
IBP, INC.	)	
Respondent	)	
Self-Insured	)	

ORDER

Claimant requested Appeals Board review of Administrative Law Judge Brad E. Avery's October 23, 1998, Award. The Director appointed Jeff K. Cooper to serve as Board Member Pro Tem in place of Gary M. Korte who recused himself from these proceedings. The Appeals Board heard oral argument on June 2, 1999.

APPEARANCES

Claimant appeared by his attorney, Michael G. Patton of Emporia, Kansas. Respondent, a qualified self-insured, appeared by its attorney, Jennifer L. Hoelker of Dakota City, Nebraska.

RECORD AND STIPULATIONS

The Appeals Board has considered the record and has adopted the stipulations listed in the Award.

ISSUES

The Administrative Law Judge found claimant retained the ability to perform his pre-injury job and earn 90 percent or more of his pre-injury average weekly wage. Accordingly, the Administrative Law Judge limited claimant's permanent partial general disability award to a 7 percent functional impairment rating.[1]

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[1] *See* K.S.A. 44-510e(a)

On appeal, claimant contends he no longer retains the ability to perform his pre-injury job because of his work-related injuries. Furthermore, claimant argues his post-injury average weekly wage is less than 90 percent of his pre-injury average weekly wage. Therefore, claimant contends he is entitled to a much higher permanent partial disability award based on a work disability.

Conversely, respondent requests the Appeals Board to affirm the Administrative Law Judge's permanent partial general disability award. Respondent contends claimant not only retains the ability to perform his pre-injury regular job but also is earning post-injury 90 percent or more of his pre-injury average weekly wage.

The Administrative Law Judge also found claimant was entitled to 27.57 weeks of temporary partial disability compensation in the amount of $3,933.14. This issue was not raised by either party on appeal. But, after a review of the record, the Appeals Board finds this issue should be addressed.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

After reviewing the record, considering the briefs, and hearing the arguments of the parties, the Appeals Board makes the following findings and conclusions:

The Appeals Board for reasons more fully explained below, but different than the reasons found by the Administrative Law Judge, affirms the 7 percent permanent partial general disability award. But the Administrative Law Judge's finding in regard to claimant's entitlement to temporary partial disability benefits should be modified.

Does the claimant retain the ability to perform his pre-injury job?

The Administrative Law Judge found claimant, post-injury, retained the ability to perform his regular job as a "gutter". Accordingly, the Administrative Law Judge found claimant retained the ability to earn 90 percent or more of his average weekly wage and based the award on his permanent functional impairment rating.

In support of this conclusion, the Administrative Law Judge found that orthopedic surgeon David A. Tillema, M.D., the court appointed independent medical examining physician, testified that claimant retained the ability to perform the gutter job he performed at the time of his injury. Respondent also contends that Dr. Tillema approved claimant to perform the gutter job. The Appeals Board disagrees with both the Administrative Law Judge's finding and respondent's argument.

After Dr. Tillema examined the claimant and reviewed his previous medical treatment records, the doctor imposed permanent restrictions on claimant of no lifting greater than 40 to 50 pounds and limited bending and stooping. Dr. Tillema was

requested to review a list of job tasks that claimant had performed in the 15 years next preceding his August 15, 1994, work-related accident. The job task lists were two separate lists, one completed by claimant's vocational expert, Richard W. Santner, and the other completed by respondent's vocational expert, Gary Gammon. Both experts described three job tasks that claimant had to complete to do the pre-injury gutter job. The third job task required claimant to work at the bottom of the cow, with a knife to remove the cow's heart and lungs and place them on a conveyor belt. This particular task required claimant to frequently stoop, twist, and reach. On two occasions during his testimony, Dr. Tillema specifically stated that claimant could not perform this job task because it required claimant to stoop and bend below the waist.

The only other physician that testified and expressed an opinion on claimant's job task performing ability was orthopedic surgeon Sergio Delgado, M.D. In September of 1994, claimant first received treatment for his low-back injury through the company physician, Edward G. Campbell, M.D. Dr. Campbell then referred claimant to Dr. Delgado for examination and treatment. Dr. Delgado saw claimant for treatment on two occasions, September 19, 1994, and October 5, 1994. Additionally, at claimant's attorney's request, Dr. Delgado again examined claimant on October 28, 1997. At that time, the doctor was provided with the two job task lists complied by the vocational experts. During his deposition, based on the permanent restrictions the doctor had placed on claimant that included to avoid activities requiring repetitive bending and twisting, Dr. Delgado testified claimant could not perform two of the three job tasks listed as requirements for the gutter job.

After Dr. Campbell saw claimant, he took claimant off the gutter job because of his low-back injury. Respondent then assigned claimant to a job identified as a gland trimmer. Claimant testified he only had to perform one half of the gland trimmer job duties. Claimant worked on this job until on May 27, 1997, he voluntarily bid to the job of washing tails. There is no evidence in the record that respondent ever requested claimant to return to the gutter job. Claimant was working on the washing tails job at the time he testified at the regular hearing held on September 2, 1997.

Additionally, claimant established through his testimony he had continuing pain and discomfort in his low back and leg. He further testified he could not perform the gutter job duties because of the repetitive bending and twisting.

The Appeals Board concludes that the testimony of Dr. Tillema and Dr. Delgado, coupled with the testimony of the claimant, is persuasive and proves that, because of claimant's work-related injuries, he cannot perform the gutter job he was performing at the time of the injury

What is claimant's pre-injury and post-injury average weekly wage?

The dispute involving claimant's pre-injury average weekly wage centers around whether claimant's wage must be calculated on a 5-day work week or a 6-day work week.[2] In Tovar, the court found when a worker is told he is expected to be available for work on Saturdays, and did in fact often work on Saturdays, this is tantamount to a directive he is expected to work on Saturdays. The statute that provides for the computation of a worker's average weekly wage requires the weekly rate to be computed on the number of days a worker is "expected" to work, not the number of days he actually works. Accordingly, since the worker was expected to work on Saturdays, the court held his average weekly wage should be computed on a 6-day work week.[3]

Here, the claimant testified he was expected to work on Saturdays. On Thursday or Friday respondent would post on the bulletin board whether the plant was operating on Saturdays. If the plant was operating, then all employees were required to work on Saturdays. Claimant testified he was required to keep Saturdays open and did not know if he was going to work on Saturdays until he was notified by the respondent on Thursday or Friday.

A wage statement was supplied by the respondent and was admitted into evidence at the regular hearing. This wage statement indicated that the claimant in the 26 weeks before his accident worked overtime in 13 of those 26 weeks. The respondent did not contradict claimant's testimony or the validity of the wage statement. Therefore, the Appeals Board finds, as did the Administrative Law Judge, that claimant's pre-injury average weekly wage should be computed on the basis of a 6-day work week. Utilizing the respondent's wage statement, the claimant argued his pre-injury average weekly wage based on a 6-day work week plus the overtime worked was $507.49. As did the Administrative Law Judge, the Appeals Board adopts $507.49 as claimant's pre-injury average weekly wage.

Claimant testified at the regular hearing held on September 2, 1997, that he was currently earning $9.20 per hour working the washing tail job. He also testified he was earning $9.30 per hour while working on the accommodated trimming gland job. Also admitted into evidence at the regular hearing was claimant's detailed earning statement for the 26-week period claimant had worked before the week ending July 19, 1997. Claimant testified that in the last two years when respondent required him to work overtime on Saturdays, the respondent would require the claimant to take a day off during the week. Therefore, the Saturday hours worked would be paid at straight time instead of the time and a half overtime rate. But the Appeals Board finds from a review of the post-injury detailed earning statement that when claimant worked overtime during a week he was still

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[2] *See* Tovar v. IBP, Inc., 15 Kan. App. 2d 782, 817 P.2d 212, *rev. denied* 249 Kan. 778 (1991).

[3] *See* 15 Kan. App. 2d at 787 and K.S.A. 44-511(b)(4)(B).

paid at the time and a half overtime rate. Furthermore, except for weeks that contained holidays, and for two weeks indicating claimant worked 39.75 regular hours, claimant worked 40 hours per week . Therefore, the earnings record contradicts claimant's assertion that post-injury he was not receiving overtime pay for working on Saturdays.

During the 26-week period before July 19, 1997, claimant worked some overtime hours in 17 of those 26 weeks. The Appeals Board finds that claimant's post-injury wage also should be computed on a 6-day work week, the same as the pre-injury average weekly wage was computed. Accordingly, claimant's post-injury average weekly wage is found to be $473.49 per week and is computed as follows:

a.	Straight Time: $9.20 x 48 hours =	$441.60
b.	Saturday Overtime: at the one half hour overtime premium rate of $4.60 x 97 hours (overtime worked 8 hours or less per week) = $446.20 ÷ 26 weeks =	$17.16
c.	Daily Overtime: at time and a half overtime rate of $13.80 x 27.75 hours (overtime over 8 hours worked in a week) = 382.95 ÷ 26 weeks =	$14.73
	Claimant's Post-Injury Average Weekly Wage	$473.49[4]

What is the nature and extent of claimant's disability?

If claimant's post-injury average weekly wage equals 90 percent or more of his pre-injury average weekly wage, he shall not receive permanent partial general disability benefits in excess of the percentage of functional impairment.[5] As found above, claimant's pre-injury average weekly wage is $507.49 and his post-injury average weekly wage is $473.49. When these two average weekly wages are compared, claimant is earning 93 percent of his pre-injury average weekly wage. Therefore, the Appeals Board concludes claimant's entitlement to permanent partial general disability benefits is limited to his permanent functional impairment rating. The Administrative Law Judge found claimant's permanent functional impairment rating was 7 percent of the body as a whole based on the opinions expressed by Dr. Delgado of 8 percent, Dr. Tillema of 7 percent, and Dr.

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[4]The wage statement does not separate out the amount of overtime worked on Saturdays or the overtime worked during the week. Therefore, it will be assumed all the overtime paid up to the first 8 hours per week was for work performed on Saturday. The regular work week includes the staight time for the first 8 hours of overtime worked per week and for those 8 hours the one half time overtime premium should be added. Any amount of overtime worked in excess of 8 hours per week should be computed at time and one half. *See* Smith v. IBP, Inc., WCAB Docket No. 183,560 (April 1998)

[5]*See* K.S.A. 44-510e(a)

Darnell of 7 percent. The Appeals Board adopts the Administrative Law Judge's finding that claimant is entitled to a 7 percent permanent partial general disability award.

Temporary Partial Disability

The Administrative Law Judge found claimant was entitled to 27.57 weeks of temporary partial disability compensation from October 15, 1994, until he met maximum medical improvement on April 25, 1995. Although claimant did not work at his regular job after his injury, he was paid his regular hourly rate until October 15, 1994. During this period, the record establishes claimant worked the accommodated gland trimmer job and was required to miss work for continued medical treatment.

In the record, claimant's counsel stated he would provide in his submission letter to the Administrative Law Judge the periods claimant was claiming temporary total disability compensation. But claimant's submission letter did not contain that information. The Administrative Law Judge also found the record did not contain any evidence that claimant was incapable of performing any type of substantial employment and therefore not entitled to temporary total disability.

The Administrative Law Judge did find that claimant's actual weekly earnings during the period from October 15, 1994, through April 25, 1995, averaged $293.61 per week. He then compared that with claimant's average weekly wage of $507.49 finding a difference in the amount of $213.88 per week. Taking 66 2/3 percent of that amount or $142.65 per week times 27.57 weeks equals $3,933.14 of temporary partial disability benefits.

But the Appeals Board finds that claimant's detailed earning statement for this period shows claimant's average weekly earnings, including over time, equaling $345.20 per week instead of the $293.61 per week found by the Administrative Law Judge. Therefore, claimant's entitlement to temporary permanent partial disability compensation would be $108.20 per week instead of the $142.65 per week found by the Administrative Law Judge for a total of $2,983.07 instead of $3,933.14. Converting the temporary partial disability to temporary total disability compensation for purposes of calculating the award would amount to 9.35 weeks of temporary total compensation at $319 per week.[6]

The Appeals Board also adopts all other findings and conclusions contained in the Award, that are not inconsistent with this Order. Specifically, the Appeals Board finds claimant was disabled because of his work-related injuries for at least one week from earning full wages. Also, since claimant could not return to the pre-injury gutter job, he was disabled from performing the job at which he was employed when injured.

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[6] *See* Richardson v. Wichita Arms, Inc., WCAB Docket No. 176,396 (August 1994)

AWARD

WHEREFORE, it is the finding, decision, and order of the Appeals Board that Brad E. Avery's October 23, 1998, Award should be, and is hereby, modified as follows:

WHEREFORE, AN AWARD OF COMPENSATION IS HEREBY MADE IN ACCORDANCE WITH THE ABOVE FINDINGS IN FAVOR of the claimant, Charles Lewis, and against the respondent, IBP, Inc., a qualified self-insured, for an accidental injury which occurred on August 15, 1994, and based upon an average weekly wage of $507.49.

Claimant is entitled to 9.35 weeks of temporary total disability compensation at the rate of $319 per week or $2,983.07, followed by 29.05 weeks at the rate of $319 per week or $9,266.95 for a 7% permanent partial general disability, making a total award of $12,250.02, which is due and owing and is ordered paid in one lump sum, less any amounts previously paid.

All remaining orders of the Administrative Law Judge are adopted by the Appeals Board that are not inconsistent with this Order.

IT IS SO ORDERED.

Dated this ____ day of October 1999.

BOARD MEMBER PRO TEM

BOARD MEMBER

BOARD MEMBER

c: Micheal G. Patton, Emporia, KS
Jennifer L. Hoelker, Dakota City, NE
Brad E. Avery, Administrative Law Judge
Philip S. Harness, Director